

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Expanding the Economic and Innovation	)	Docket Nos. 12-268 and 13-26
Opportunities of Spectrum Through	)	
Incentive Auctions	)	
	)	

**REPLY COMMENTS OF SINCLAIR BROADCAST GROUP, INC.  
ON UPDATED OET-69 SOFTWARE**

Sinclair Broadcast Group, Inc. (“Sinclair”) submits these reply comments in response to other comments on the Office of Engineering and Technology’s proposed use of *TVStudy* for purposes of the proposed incentive auction of broadcast television spectrum.<sup>1</sup> Sinclair opposes the use of *TVStudy*, or any other new or modified software that would change OET-69, or the methodology or application of OET-69, for purposes of the incentive auctions.

Calling *TVStudy* “new OET-69 software” CTIA argues that it “offers a variety of improvements” that will enable the Commission to conduct a more precise and informed repacking process.<sup>2</sup> Responding to the National Association of Broadcaster’s (“NAB”) assertion<sup>3</sup> shortly after release of the Public Notice that the proposed changes are contrary to the Spectrum Act,<sup>4</sup> CTIA argues that the FCC should be entitled to *Chevron* deference in choosing whether and how to make changes to the calculations used to determine coverage area and population served. In support, CTIA cites *EchoStar Satellite LLC v. FCC*, 457 F.3d 31 (D.C. Cir. 2006) (“*Echostar*”), in which the court upheld the FCC’s adjustment of its Longley-Rice model for UHF stations while not making

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<sup>1</sup> See *Public Notice*, Office of Engineering and Technology Releases and Seeks Comment on Updated OET-69 Software, DA 13-138 (rel. Feb. 4, 2013) (“Public Notice”).

<sup>2</sup> See Comments of CTIA-The Wireless Association (“CTIA Comments”) at 5.

<sup>3</sup> See Letter from Rick Kaplan, NAB to Marlene H. Dortch, FCC, GN Docket No. 12-268 (Feb. 8, 2013).

<sup>4</sup> See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6402, 6403, 125 Stat. 156 (2012) (“Spectrum Act”).

changes to the VHF model. But at issue in *Echostar* was a statute directing the FCC to “take all actions necessary . . . to develop and prescribe by rule a point-to-point predictive model for reliably and presumptively determining the ability of individual locations to receive signals [of Grade B intensity].” 47 U.S.C. § 339(c)(3). Specifically, the Commission was to “rely on the [ILLR] model set forth [in an earlier FCC order] and ensure that such model takes into account terrain, building structures, and other land cover variations.” *Id.*

Following Congress’ direction, the FCC conducted a notice and comment rulemaking proceeding<sup>5</sup> and ultimately did “prescribe by rule” a “predictive model for reliably and presumptively” making the required determinations.<sup>6</sup> *Echostar* appealed, arguing that the FCC had not properly accounted for land cover variations with respect to VHF stations. The court affirmed the Commission, finding under the first part of its *Chevron* analysis that the intent of Congress was clear: the FCC’s fundamental mandate was to design a model that “reliably” predicts signal strength, and the FCC’s decision was consistent with that clear mandate. *Echostar* at 37. The court never reached the “deference” question of whether the FCC’s decision was “permissible” under the statute. *Echostar* therefore says nothing at all about the appropriate extent of deference to the FCC under SHVIA, much less so under Section § 6403(b)(2) of the Spectrum Act, which was not even being debated at the time.

CTIA is also wrong to imply that because Congress once specifically ordered the FCC to review a different coverage prediction model in a different context, that the FCC should be entitled to ignore the clear intent Congress expressed in adopting Section § 6403(b)(2) of the Spectrum Act and modify OET-69 now. In the SHVIA language at issue in *Echostar*, Congress ordered the FCC

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<sup>5</sup> See *Establishment of an Improved Model for Predicting the Broad. Television Field Strength Received at Individual Locations*, Notice of Proposed Rulemaking, 15 F.C.C. Rcd. 1843 (2000).

<sup>6</sup> See, *Establishment of an Improved Model for Predicting the Broad. Television Field Strength Received at Individual Locations*, First Report and Order, 15 F.C.C. Rcd. 12,118, (2000).

to adopt a technical rule to implement the legislation. In Section 6403(b)(2) of the Spectrum Act, Congress instructed the FCC not to change, for purposes of conducting the incentive auction, its long-established method of calculating coverage and population. The Congressional mandate in *Echostar* was for the FCC to review its rules and make sure they were reliable. The Congressional mandate of the Spectrum Act is that the FCC not change the established basis for coverage and population predictions.

None of this is to say that *Echostar* is irrelevant to the question of FCC authority to make fundamental changes to OET-69 for purposes of the incentive auction. *Echostar* shows that when Congress wants the FCC to review and update its predictive models for broadcast coverage it knows how to state its intent clearly. In contrast, Section 6403(b)(2) specifies precisely the predictive model the FCC must use in the incentive auctions: it clearly says that the FCC does not have discretion in this particular matter. Whether Congress specifically foreclosed FCC discretion for certainty, to protect broadcasters from arbitrary FCC decisions that could result in loss of service area, or for some other reason, its intent is clear.<sup>7</sup> Changes to OET-69 are not permitted, and changes that would inflict widespread loss of coverage area and population served are inimical to the very purpose of Section 6403(b)(2).

CTIA concedes “it is clear that the implementation of OET-69 software will likely directly impact the determination of TV station coverage and population served as defined in the Spectrum Act.”<sup>8</sup> This would seem to concede the entire point. The FCC has no latitude to adopt new methodologies for calculating coverage area and population specifically to implement repacking

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<sup>7</sup> As the NAB notes, “if Congress intended to allow the Commission to redefine the methodology for calculating stations’ coverage areas and populations served for purposes of the incentive auction, then there would have been no reason for Congress to expressly incorporate the OET-69 methodology.” Comments of the NAB (“NAB Comments”) at 5.

<sup>8</sup> CTIA Comments at 3.

when Congress has instructed the FCC to freeze the coverage area, population served, and the methodology used to predict them, as of the date of enactment. So setting aside the question of whether *TVStudy* is more or less “accurate” in predicting actual coverage, even if the FCC could develop new methodologies and software that more accurately predict coverage and population than OET-69, it would not have authority to use them for repacking calculations. Congress directed the FCC to use the same yardstick it and the industry have used for years..

Yet there is no reason to believe that *TVStudy* provides more accurate information – unlike in *Echostar*, there is simply no data in the record to support a conclusion one way or the other. What is clear is that *TVStudy* consistently returns coverage area and population counts that are materially lower than those returned by OET-69. NAB’s testing of *TVStudy* found that the change in assumptions regarding flagged cells alone would reduce the predicted coverage and population served for more than 97 percent of stations, and almost half of all stations would lose 30 percent or more of predicted population compared to what OET-69 predicted on February 22, 2012.<sup>9</sup> Cohen, Dippell and Everist also note that *TVStudy* understates interference as compared to OET-69.<sup>10</sup>

It is also clear that OET has allowed insufficient time to allow stakeholders to provide meaningful feedback on *TVStudy*. As Sinclair noted in its opening comments, preeminent broadcast engineering firms encountered serious problems with *TVStudy*, ranging from issues getting the software to run on different operating systems, to inconsistent and even “drastically different” results between different firms, and even varying results by the same firm, on the same platform, with the same inputs. The comments of Merrill Weiss Group LLC reflect the difficulty and explain why OET received so little substantive commentary on such an enormously important issue:

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<sup>9</sup> See NAB Comments at 8.

<sup>10</sup> See Comments of Cohen, Dippell and Everist at 3.

Upon releasing the Public Notice and the *TVStudy* software, the Commission provided just over six weeks for evaluation of the software prior to the due date for these comments. Setting up a software system as complex as the *TVStudy* environment is a time-consuming exercise. Then evaluating such software in detail takes even more time. For a small organization such as MWG, six weeks has not been sufficient to get the software environment installed, operating, and tested, given the necessity to continue providing services to clients who depend upon us. Consequently, there has not been the time to determine whether or not the matters addressed in these comments have been adequately treated in the *TVStudy* software. Because of the lack of adequate time for such an evaluation, it was determined to be better to call attention to the issues, without benefit of determining how they are handled in the software, than to be silent on these matters in the hope that they are correctly analyzed by the *TVStudy* software.

Comments of Merrill Weiss Group LLC at 3. Legal and procedural issues aside, this simply is not the right way to approach such a complex and important task.

OET here is proposing to do exactly what Congress proscribed the FCC from doing: changing the yardstick to repack stations so tightly that their service areas are degraded. Since the very reason Congress specified OET-69 as of the date of enactment was to provide a specific yardstick for measuring preservation of coverage area and population, a new approach that consistently returns smaller coverage areas and lower populations served than does OET-69 as of February 22, 2012 is plainly inconsistent with the statute. This is especially the case when the FCC has its own incentives in the auction: the NPRM expresses a top priority of repurposing as much broadcast spectrum as possible. That goal, itself contrary to the purpose of the Spectrum Act, strongly biases the FCC to repack stations as tightly as possible, and the Public Notice appears to be a manifestation of that bias.

CEA argues that *TVStudy* will assist the Commission in meeting the “all reasonable efforts” statutory criteria for repacking broadcast stations.<sup>11</sup> According to CEA, before the Commission can

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<sup>11</sup> See Comments of the Consumer Electronics Association at 9.

preserve coverage and population served by a given television station, it must first develop an accurate assessment of the area currently covered and the population currently served. Perhaps, if the new proposed methodology returned better population and coverage than OET-69 as of the date of enactment of the Spectrum Act, CEA would have a point. But *TVStudy* yields an enormous net loss of service. This is a “reasonable effort” television broadcasters and their viewers can do without. As explained above, Congress did not instruct the FCC to develop new measurement tools. Contrary to CEA’s argument, there is no mandate to build a better mousetrap. The mandate is to use the same mousetrap.

Sinclair agrees with CTIA on one important point: OET-69 is just one piece of the repacking puzzle, and interested parties should have the opportunity to review and comment on the entire package.<sup>12</sup> The Commission should release its entire repacking plan, including all software and algorithms, for public comment well in advance of adopting final rules for the auction.

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<sup>12</sup> See CTIA Comments at 20.

For the reasons explained in these reply comments, in Sinclair's opening comments, and in the NAB's comments, Sinclair urges the FCC not to pursue changes to the long-established predictive model Congress mandated the FCC use for the incentive auctions. Even absent Congressional mandate, the FCC should not accept an approach that yields substantial net loss of broadcast service. The FCC can and should do better. With due care the FCC can design an auction process that will serve the best interests of all stakeholders and result in a substantial net gain in advanced services available to Americans.

Respectfully submitted,

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